STATE OF MICHIGAN

COURT OF APPEALS

ROBERT PERRY and JANET PERRY, d/b/a COUNTRY PINES MOBILE HOME PARK,

Plaintiff-Appellants,

and

GRACE NORRIS, HELEN E. HALL, LARRIE BARR, MARILYN BARR, WILLIAM BERGER, GERTRUDE BERGER, ELMER FLETCHER, ERVA FLETCHER, ORRAN CHADWICK, DONNA CHADWICK and MAXINE HYMAN,

Plaintiffs,

v

TOWNSHIP OF LEXINGTON,

Defendant-Appellee.

UNPUBLISHED
May 6, 1997

No. 190737
Sanilac Circuit Court
LC No. 93-022293-AA

Before: Doctoroff, P.J., and Michael J. Kelly and Young, JJ.

PER CURIAM.

Plaintiffs Janet and William Perry appeal by leave from an order granting summary disposition to defendant pursuant to MCR 2.116(I)(2). We reverse.

This dispute began in 1982 when the Perrys sought defendant's permission to construct a thirty-two site mobile home park. Defendant approved the Perrys' application and increased the size of the park to accommodate forty-four units. The Perrys later applied to the zoning board for a conditional use permit to add another twenty-four units, and they applied for and received a construction permit from the Mobile Home Commission to build on proposed lots 45 through 69. In actions that were consolidated, the Perrys requested that the circuit court force defendant to allow them to build on lots 45 through 69, and defendant sought an injunction to prevent the Perrys from doing so. In an opinion entered on October 18, 1988, the circuit court determined that defendant had the authority to enforce its setback requirements and ordered that the Perrys remove or move any mobile homes that had been

placed on lots 45 through 69 to comply with defendant's one-hundred foot setback requirement. In a subsequent order to enforce this judgment, the Perrys were required to evict all tenants affected by the setback requirement. Apparently, the Perrys complied with respect to lots 45 through 52 and lots 61 through 69, but the tenants of lots 53 through 60 sought a declaratory judgment to prevent the enforcement of this order. The circuit court dismissed the tenants' action on the ground of res judicata, and upon the tenants' appeal, this Court affirmed in an unpublished decision. *Chadwick v Lexington Twp*, unpublished opinion per curiam of the Court of Appeals (Docket No. 158039).

In an apparent attempt to comply with the October 18, 1988 judgment, the Perrys applied for a special use permit to allow them to either turn the homes located on lots 53 through 60 ninety degrees or to move the homes to lots 61 through 69. The zoning board refused the request to turn the homes but allowed the Perrys to develop all the requested lots except for number 61. The Perrys and the tenants of lots 53 through 60 appealed this decision to the circuit court, arguing that the zoning board's denials of their applications were unreasonable and that they should be allowed to modify their site plan in one of the ways requested. Plaintiffs moved for summary disposition pursuant to MCR 2.116(C)(9) and(10); however, the circuit court denied this motion, noting that the case had previously been decided. In an order entered one and one-half years after this ruling, the court found that defendant was entitled to judgment of dismissal pursuant to MCR 2.116(I)(2) and dismissed the complaint with prejudice.

The Perrys argue that the circuit court, in essence, dismissed the complaint based on the doctrine of res judicata and that this doctrine did not apply. "The doctrine of res judicata bars a subsequent action between the same parties when the facts or evidence to the maintenance of the two suits are identical and the issues and parties or privies are identical." *Oscar v Kais*, 184 Mich App 302, 307; 457 NW2d 145 (1990). When, in the interval between a prior order and a claim, facts that would alter the legal rights and relations of the parties change, the doctrine does not bar relitigation. *In re Turner*, 108 Mich App 583, 588; 310 NW2d 802 (1981). In the interim between the original order and the filing of this action, the Perrys requested a modification of their site plan in an attempt to comply with the original order that they not violate defendant's setback requirement. Yet, the zoning board did not approve this plan. Because these facts have changed, res judicata would not bar this suit. *Id*.

The Perrys also contend that the trial court erred in granting summary disposition to defendant. Because the parties disagreed on whether the zoning board acted arbitrarily and capriciously in denying the Perrys' application, it appears that there was a genuine issue of material fact to be decided. In any event, such a motion was improperly considered by the circuit court because the court was not sitting as a court of original jurisdiction, but rather as a court of appellate jurisdiction. *Carleton Sportsman's Club v Exeter Township*, 217 Mich App 195, 201; 550 NW2d 867 (1996). Instead, the circuit court should have reviewed the record and decision of the zoning board for competent, material, and substantial evidence in support of the decision and to determine if it was authorized by law. *Id.*, 203 Hence, defendant was not entitled to summary disposition.

Reversed and remanded for proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Martin M. Doctoroff
/s/ Michael J. Kelly
/s/ Robert P. Young